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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 436

HUMBLE OIL & REFINING COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

No.

ROY MOORLEY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

Joint Petition for Writ of Certiorari to The United States Court of Appeals for the Tenth Circuit and Brief in Support Thereof

---

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ROY MOSELEY, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*

JOINT PETITION FOR WRIT OF CERTIORARI

To the Honorable The Supreme Court of the United States:

Humble Oil & Refining Company and Roy Moseley jointly pray that a writ of certiorari issue to review the judgment in this case by the United States Court of Appeals for the Tenth Circuit.

Opinion Below

No opinion was written by the District Court in this case. The opinion of the Court of Appeals has not been reported but appears in the printed record, pages 335 to 343.

Summary Statement of Matter Involved

Petitioners were convicted on nine counts of an indictment charging that petitioners violated the Connally Act (15 USCA, § 715 et seq.) in failing and omitting to make and keep a complete and accurate daily record of oil produced on certain leases in Lea County, New Mexico. (R. 52, 56, 57)

These nine counts are identical except that each described different land or a different period of time from any of the others. Each count charges that petitioners were legally required to keep such records by regulations of the Federal Petroleum Board (30 CFR 302), alleged to have been duly prescribed pursuant to the Connally Act and alleged to have been "continuously throughout said period * * * lawfully in force and effect" in Lea County, New Mexico. (R. 31-35)

The nub of this controversy is the question whether the regulations of the Federal Petroleum Board were in effect in New Mexico during the periods of time covered by the indictment.

The authority of the Board to require the keeping of records is derived from 15 USCA, § 715 (d), which empowers the President to prescribe such regulations as he may find necessary or appropriate for enforcement of the Act, including regulations requiring the keeping of books and records. By its terms the Connally Act is restricted in application to those areas where the States have limited pro-

duction of oil. It is the contention of petitioners that, since New Mexico had not limited production during the periods in question, the Connally Act was not applicable to New Mexico during those periods and, consequently, no criminal liability could result from failure to comply with the Board's regulations even though the Board attempted to extend these regulations to New Mexico.

The record reflects the following history of proration in New Mexico. In 1930, shortly after discovery of oil in Lea County, the various producers formed an Engineering Committee and employed C. G. Staley to act as Chairman and to distribute the total market outlet equitably among the producers. (R. 90) In 1935 the New Mexico legislature enacted a Conservation Act, creating the Oil Conservation Commission and authorizing the Commission, after notice and hearing, to limit total production in the State to market demand and to prorate the State allowable ratably among fields and between leases and wells. (R. 69-70, 90; Ch. 168, § 17, New Mexico Laws 1949)

From 1935 to February, 1950, the Commission issued each month a figure representing the total allowable for the State during the following month. This action was taken by the Commission without notice or hearing. Until February, 1950, the Commission did not give notice or hold a public hearing in connection with the State allowable. (R. 66-68) Counts XVIII, XIX, XX, XXIV and XXV, on which petitioners stand convicted, cover periods of time prior to February, 1950, during which all Statewide allowables were fixed without notice or hearing. (R. 31-32, 34-35)

During the entire period covered by the indictment the Commission did not distribute or prorate the Statewide allowable among the various fields or between the leases and wells; this function was performed exclusively by Mr. Staley, who was employed by the producers. (R. 91) All

of the expense of assembling the necessary data, making tests, calculating allowables and printing schedules, as well as Mr. Staley's salary, was borne by the oil producers; none of this expense was paid by the Commission. (R. 91-93) These schedules were printed and mailed out to the various operators by Mr. Staley before the Commission saw them; the Commission did not approve or adopt them. (R. 93) The allowables contained in schedules prepared and issued by Mr. Staley were the only allowables in New Mexico during the periods of time covered by the indictment. (R. 97-98)

Several weeks prior to trial petitioners moved to suppress all orders of the New Mexico Commission which purported to limit the production of oil during all periods of time covered by the indictment. (R. 40-43) Petitioners urged that these orders were void because (a) statutory requirements for notice and hearing were not met, and (b) the orders actually were made by Mr. Staley and not by the Commission. In support of their motions to suppress, petitioners introduced the testimony of Mr. Staley and Mr. Spurrier, State Geologist and a member of the Commission. Upon the undisputed testimony of these witnesses, the trial court sustained petitioners' motions to suppress and entered an order containing the following language:

> "Now, Therefore, It Is Ordered By The Court That all orders or purported orders of the New Mexico Oil Conservation Commission up to July, 1950, which may have regulated or purported to fix allowable production of the various oil fields, oil pools, and oil wells as indicated by schedules prepared by C. G. Staley within the State of New Mexico, and to limit, regulate or allocate the production of oil which may be produced from any oil field, oil pool or oil well within the State of New Mexico are hereby rejected as not being com-

petent evidence on behalf of the government in proving the production and transportation of contraband oil in this case." (R. 44)

Petitioners then moved the court to dismiss the indictment, and each count thereof, on the ground that the charges in the indictment could not be sustained without the evidence suppressed by the court. (R. 44-51) The trial court denied this motion except as to Counts 2 to 17, inclusive, which Counts were dismissed. (R. 109) The dismissed Counts charged transportation of contraband oil and the trial court held that, in view of his ruling on the proration orders, there was no "contraband oil" during the period in question. (R. 110)

The government did not offer in evidence either the statewide orders by the Commission fixing one figure for the daily production for the whole state or Staley's proration schedules prescribing the allowable for each lease and well. They were introduced only by petitioners upon their motion to suppress them, which was heard several weeks before the case was tried. The government never offered them for any purpose and they were not received in evidence in the case. (R. 2)

When plaintiff rested its case, petitioners moved for acquittal and urged again the grounds contained in their motions to dismiss and their motions to suppress the orders of the Commission. (R. 115-119) The trial court overruled petitioners' motions for acquittal. Again, at the conclusion of all evidence and before the case was submitted to the jury, petitioners moved for acquittal on all of the grounds contained in previous motions, including the ground that there could not be a violation of the Connally Act because no contraband oil was or could have been produced. The trial court overruled these motions. (R. 180-183)

After verdict and before sentence, petitioners renewed their motions for acquittal and moved the trial court to set aside the jury's verdict and acquit appellants. Again petitioners urged that the Connally Act and the rules of the Petroleum Board alleged in the indictment were inapplicable because no contraband oil was or could have been produced in the absence of state regulation of production. (R. 52-55) The trial court overruled these motions and imposed sentences upon petitioners as follows: Humble Oil & Refining Company was fined $2,000 under Count 18, and $1,000 each under the remaining 8 Counts, making a total fine of $10,000.00; Roy Moseley was fined $2,000 under Count 18, and sentence under Counts 19 to 25, inclusive, was suspended. (R. 191) Petitioners duly perfected appeal from the judgment of the District Court.

The Court of Appeals for the Tenth Circuit affirmed the judgment of conviction on all Counts. The judgment of affirmance was rendered on July 31, 1952. Petitioners filed a petition for rehearing, which was overruled on October 6, 1952.

Conceding the invalidity of all orders issued by Mr. Staley, the Court of Appeals held that the existence of orders limiting production from the State as a whole invoked the jurisdiction of the Federal Petroleum Board. To reach this result the Court of Appeals made two assumptions, both of which are contrary to the record. First the Court of Appeals assumed and stated in the opinion that these statewide orders were introduced in evidence, whereas the record shows that they were not introduced or offered in evidence. Second, the Court of Appeals assumed and stated in the opinion that all of the statewide orders were valid, whereas the record shows that the orders on which Counts XVIII, XIX, XX, XXIV and XXV are based were issued without notice or hearing.

The Court of Appeals construed the Connally Act as applying to any area in a State where a valid statewide allowable has been set, even though that statewide allowable never is distributed or prorated between areas or fields or among leases and wells. As to this holding, petitioners say that (1) even if it were correct, the conviction should be reversed insofar as Counts XVIII, XIX, XX, XXIV and XXV are concerned; (2) it is not correct because the Connally Act can apply only to areas where "contraband oil" could be produced and "contraband oil" cannot be produced from a well or a lease or a field until a limit is placed on production from that well or lease or field; (3) there is no evidence to support this holding because it was not shown that a statewide allowable had been set.

As an alternative ground for affirming the conviction, the Court of Appeals held that petitioners were estopped to dispute the validity of the Federal Petroleum Board regulations by reason of the fact that Humble Oil & Refining Co. had purported to comply with the regulations. Citing U. S. v. KAPP, 302 U.S. 214, and KAY v. U. S., 303 U.S. 1, the opinion states that the invalidity or inapplicability of the Federal regulation cannot be urged as a defense because Humble kept records and thereby purported to comply. As to this holding, petitioners point out that the prosecution in the present case is under the regulation attacked. Petitioners are not charged with making false reports; they are charged with failure to keep records. If the regulation requiring the keeping of records is inapplicable or invalid, then petitioners could not be convicted, regardless of whether they kept inaccurate records or no records at all.

Jurisdiction

The jurisdiction of this Court is invoked under the Judicial Code (28 U.S.C.A., § 1254) and Rule 37(b) of the

FEDERAL RULES OF CRIMINAL PROCEDURE. The Court of Appeals denied petition for rehearing on October 6, 1952.

Questions Presented

1.

Was the Connally Act applicable to New Mexico prior to February, 1950, when there was no valid State regulation limiting production from the State as a whole or from any field, lease or well in the State?

2.

Was the Connally Act applicable to New Mexico during February, March and April, 1950, when there were valid State orders limiting production from the State as a whole but no State order limiting production from any field, lease or well in the State?

3.

Under the Connally Act can the Federal Petroleum Board extend its jurisdiction to areas where no "contraband oil" is or could be produced?

4.

Where the applicability of a Federal criminal statute depends upon the existence of State regulation, can a citizen be convicted of a violation of such a statute without proof that the State regulation exists?

5.

Where the applicability of a Federal criminal statute depends upon the existence of State regulation, can a citizen be convicted of a violation of such a statute when the undisputed evidence at a preliminary hearing shows that attempts at State regulation were invalid?

6.

Are petitioners criminally liable for failure to keep records

even though there is no applicable regulation requiring them to do so?

Reasons for Allowance of the Writ

1.

If this conviction is allowed to stand, petitioners will have been punished for a crime not created by Congress, but by administrative action which extended the jurisdiction and effect of a statute beyond the scope of its language and its intended effect. The Connally Act was intended only to prevent the shipment of contraband oil in interstate commerce. Under the terms of the Act there could be no contraband oil until the state had lawfully limited production. And yet petitioners stand convicted of failing to comply with Federal regulations in New Mexico during a period when there had *never* been any valid limitation upon production even for the whole state, when there was nothing but a state statute which *authorized* a Commission to limit production and no single valid step to do so had ever been taken.

2.

The holding of the Court of Appeals is in conflict with the holdings of the Fifth Circuit in THE PRESIDENT v. SKEEN, 118 F. 2d 58 (1941), GRISWOLD v. THE PRESIDENT, 82 F. 2d 922 (1936), and RYAN v. AMAZON PETROLEUM CORP., 71 F. 2d 1 (1934, reversed on other grounds, 293 U.S. 388) which hold that the Connally Act is not invalid as a regulation of or interference with the intrastate activity of petroleum production because the Act operates only to aid and supplement the enforcement of valid regulation of production by the various states. If the holding of the Tenth Circuit in the instant case is sustained, the effect certainly will be to permit the intrusion of the Federal Government into a realm of purely local activity, because during the period in question there was no regulation of pro-

duction by the State of New Mexico in aid of which the Connally Act could have operated.

3.

An important principle of administrative law is involved and the effect of the decision of the Court of Appeals is that an administrative agency can extend its jurisdiction beyond the scope of the statute under which it acts and can create criminal liability which is not authorized by that statute.

4.

The holding that petitioners can be punished for failing to keep records even though the regulation requiring the keeping of records is invalid or inapplicable is fundamentally erroneous and involves an important principle of Federal law.

Conclusion

WHEREFORE, petitioners pray that this Court issue a writ of certiorari, directed to the United States Court of Appeals for the Tenth Circuit, and that the judgment of the Court of Appeals and the judgment of the District Court be reversed by this Honorable Court.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion Below

No opinion was written by the District Court in this case. The opinion of the Court of Appeals for the Tenth Circuit has not been reported but will be found in the printed record, pages 335 to 343.

Jurisdiction

The jurisdiction of this Court is invoked under the JUDICIAL CODE (28 U.S.C.A.. § 1254) and Rule 37(b) of the FEDERAL RULES OF CRIMINAL PROCEDURE. The Court of Appeals denied petition for rehearing on October 6, 1952.

Statement of the Case and Questions Presented

For a statement of the case and the questions presented, see the foregoing Petition (p. 2, et seq.).

Specification of Errors

1. The Court of Appeals erred in holding that the Connally Act and the regulations prescribed thereunder were applicable to the State of New Mexico during the period prior to February 1950, when there had never been any valid action by that State to limit production, either for the State as a whole or for any well or lease.

2. The Court of Appeals erred in holding that the Connally Act and the regulations prescribed thereunder were applicable to the State of New Mexico during any period covered by the indictment, because the State had imposed no limitation upon the production from any well or lease

in the State and no contraband oil could possibly have been produced in the State.

3. The Court of Appeals erred in holding that the evidence was sufficient to sustain this conviction under the Connally Act, because no evidence was introduced to prove that the state of New Mexico had taken any steps to limit the production of oil, either for the state as a whole or for any well or lease.

4. The Court of Appeals erred in holding that petitioners are criminally liable for failing to keep records required by Federal Petroleum Board regulation even though the regulation is inapplicable or invalid.

Argument

Proration orders issued without notice and hearing are void.

Counts XVIII, XIX, XX, XXIV and XXV charge that petitioners failed to make and keep accurate daily records of oil produced from certain leases in New Mexico during various periods of time from June 22, 1948, to January 31, 1950. (R. 31-32, 34-35) No evidence was introduced at the trial to establish that the State of New Mexico at any time covered by the indictment limited the amount of oil which could be produced from any well, lease or field or from the State as a whole. (R. 2) However, if we look outside the trial record, we find that during the periods covered by the counts above enumerated there was no valid limitation of production whatever, either for the State as a whole or for individual wells or leases.

At the hearing on petitioners' motion to suppress, held several weeks prior to trial, it was established that the only orders issued by the New Mexico Commission which purported to limit production were the "Statewide" orders.

These Statewide orders were issued monthly and consisted of a number representing the maximum quantity of oil which could be produced daily during the following month from the State as a whole. The undisputed evidence at the preliminary hearing showed that prior to February, 1950, all Statewide orders here involved were issued without notice or hearing. (R. 66) These orders resulted from informal, unscheduled meetings between Mr. Spurrier and one of the other members of the Commission at some unappointed time and place. (R. 67) There was no regular time and place for meetings to consider the Statewide allowable. (R. 67)

The Commission's authority to limit production is derived from the New Mexico statutes, which plainly require notice and hearing. Chapter 168, Section 17, NEW MEXICO LAWS 1949 (Appendix p. 34), which re-enacted without amendment Chapter 72, Section 15, NEW MEXICO LAWS 1935, expressly provides that "* * * before any rule, regulation or order * * * shall be made under the provisions of this act * * * a public hearing shall be held at such time, place and manner as may be prescribed by the Commission. The Commission shall first give reasonable notice of such hearing * * * and at any such hearing any person having an interest in the subject matter shall be entitled to be heard."

Chapter 168, Section 5, NEW MEXICO LAWS 1949 (Appendix p. 35), which re-enacted Chapter 72, Section 5, NEW MEXICO LAWS 1935, with a change in only one word, provides that any notice required by the Conservation Act shall be by personal service or by publication in newspapers in a certain manner. This statute requires that such notice contain the time and place of hearing, the nature of the order contemplated by the Commission, and the source of supply which may be affected.

Since the proration orders prior to February, 1950, were issued without any notice or hearing they are void. This is necessarily true because the statutes which authorized their issuance made notice and hearing prerequisites to their validity. As this Court said in MORGAN v. U. S., 298 U.S. 468, 477:

> "Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. *For the statute itself demands a full hearing and the order is void if such a hearing was denied.*"*

Some other decisions supporting this fundamental proposition are: OHIO BELL TELEPHONE Co. v. P. U. C., 301 U.S. 292, 304; BALTIMORE & OHIO R. Co. v. U. S., 264 U.S. 258, 265; I. C. C. v. LOUISVILLE & N. R. Co., 227 U.S. 88, 91; CHIN YOK v. U. S., 208 U.S. 8.

If the New Mexico Act had permitted the Commission to limit production without notice and hearing it undoubtedly would have violated the Due Process Clause of the Constitution. The Act was valid because it required notice and hearing and the orders prior to February, 1950, were invalid because issued in violation of these essential requirements. Therefore at all times covered by Counts XVIII, XIX, XX, XXIV and XXV there was no State limitation on production of oil *from the State as a whole* or *from any lease or well*. The New Mexico statutes did not limit production or institute a system of proration. These statutes merely authorized the Commission to limit production *after notice and hearing*. Prior to February, 1950, the situation was the same as if the Commission had never attempted to exercise that authority.

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* Emphasis supplied throughout this brief unless otherwise indicated.

The opinion of the Court of Appeals indicated that the Court did not realize that the above enumerated Counts depended upon orders issued without notice and hearing. Apparently assuming the existence of valid Statewide orders to support all Counts, the Court of Appeals said: "In effect appellant concedes that at least some of the general orders during the time in question were valid." (R. 338) The quotation from petitioners' brief cited by the Court in support of this statement shows that petitioners conceded validity only to Statewide orders *after* February, 1950. Orders entered after that date have no bearing on Counts XVIII, XIX, XX, XXIV and XXV. (R. 31-35)

The Connally Act was not in force in New Mexico prior to February 1950, when no valid limitation upon production had ever been imposed by that state, either for the state as a whole or for individual wells or leases.

By its own terms the Connally Act is not applicable to a state which has not placed a limitation on the quantity of oil which can be produced from the wells, leases and fields therein. The CONNALLY ACT provides that:

> "The shipment or *transportation* in interstate commerce from any state *of contraband oil* produced in such state *is prohibited*. For the purposes of this section *contraband oil shall not be deemed to have been produced in a state if none of the petroleum constituting such contraband oil*, or from which it was produced or derived, *was produced, transported or withdrawn from storage in excess of the amounts permitted to be produced, transported, or withdrawn from storage under the laws of such state or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such state.*" (15 U.S.C.A. 715b.)

The debate upon the Connally Act in Congress shows

clearly that the Act was intended to apply only to states which had imposed valid limitations upon production. In the course of the debate the question was raised whether the Act might be unconstitutional for the reason that it would have the effect of regulating the intrastate activity of production. The following exchange between Senator Connally, the author of the Act, and another member of the Senate is found at 79 CONG. REC. 754:

> "MR. GORE. The producer in any State who obeys the laws of his State will not be affected by this legislation?
>
> "MR. CONNALLY. Exactly. The Senator from Oklahoma has very pertinently suggested that the oil companies or owners of a lease or the owners of the fee who obeyed the State law never will feel the pinch of this legislation because it does not apply to them."

Likewise, in the debate in the House, Representative Cole, the head of the Committee which was sponsoring the Bill, made the following statement, which is found at 79 CONG. REC. 2,129:

> "MR. COLE of Maryland. I may say to the gentleman from Illinois that just as this bill does not apply to the State of California, where there is no State law, so would it not apply to Texas if State law was not in existence or not in force."

No contraband oil was or could have been produced from any well or lease described in the indictment, because *the Commission did not limit the production from any well or lease.* This was precisely what the trial court held when he sustained the motion to suppress and when he dismissed all counts charging the transportation of illegal or contraband oil. Any other holding would conflict with the very lan-

guage of the Act.

The courts have consistently construed the Connally Act as being effective *only* to supplement valid state regulation. UNITED STATES v. SKEEN (5 Cir.), 118 F. 2d 58, 59, holds that:

> "The purpose of the Connally Act, 15 U.S.C.A., Section 715 et seq., is to aid the states in enforcing laws limiting the amount of oil permitted to be produced from wells in designated fields, by prohibiting shipment of excess oil produced, known as 'hot' oil, in interstate commerce. It is settled that the law is a valid enactment of Congress to effect that purpose."

In GRISWOLD v. U. S. (5 Cir.), 82 F. 2d 922, 923, 925, Griswold had appealed from an injunction granted under the Connally Act. Griswold contended that, inasmuch as he was handling oil *only* in the State of Texas, application of the Connally Act to his activities would amount to control of production within the State of Texas by the Federal Government. The Court of Appeals answered Griswold's contention by holding that the Connally Act did not invade the powers of the state because the Connally Act became applicable only where the state had placed a limitation upon the amount of oil permitted to be produced. Upholding the validity of the act on the ground that it was effective only to supplement state regulation, the court said:

> "These arguments overlook, they disregard, the dominant, the controlling, fact that the act, though passed in aid of state purposes and powers, deals with, and only with, commerce interstate. It *takes up where the state power ends*, and by *supplementing state legislation* it makes completely effective the general will of the people of the state of Texas, expressed in its con-

servation laws. Congress has validly done this same thing in connection with the transportation into dry states, of intoxicating liquor, Clark Distilling Co. v. Western Maryland Ry. Co., 242 U.S. 311, 37 S. Ct. 180, 61 L. Ed. 326, L.R.A. 1917B, 1218, Ann. Cas. 1917B, 845; into states which prohibit such goods, of goods made by convict labor, Whitfield v. State of Ohio, 56 S. Ct. 532, 80 L. E. . It has done it as to the transportation out of states of birds or wild game killed there contrary to its laws, Bogle v. White (C.C.A.), 61 F. 2d 930; and as to motorcars stolen in violation of state laws, Brooks v. United States, 267 U.S. 432, 45 S. Ct. 345, 69 L. Ed. 699, 37 A.L.R. 1407.

"In Ryan v. Amazon Petroleum Corporation (C.C. A.), 71 F. 2d 1, on the assumption that there were no infirmities in the particular act under examination, we on full consideration held that Congress could validly prohibit the transportation in interstate commerce of oil which state laws have made contraband. We approve and reaffirm that holding.

"The effect of these statutes and regulations is taking up where the state leaves off, to bar these products from interstate commerce. Congress may do this by prohibiting their movement and imposing penalties upon those who violate the prohibitions. But it may, in addition to and in aid of these prohibitions, set up means, having due and reasonable relation to and confined within the powers exerted, to make these prohibitions effective to prevent the forbidden movement."

As the Court of Appeals aptly stated in GRISWOLD'S case, the Connally Act takes up where the state leaves off. As a basis for application of the Connally Act to New Mexico there must be valid limitation by the Commission on the amount of oil permitted to be produced from the wells, leases and fields in New Mexico. This is plain from the language of the Act and from the decisions construing it. The trial court in the present case correctly held that there was and could have been no contraband oil in New

Mexico during the period covered by the indictment because there was no such valid state regulation. Prior to February 1950, there had never been any valid action by the Commission to limit production in New Mexico. The statute merely authorized the Commission to establish proration, and the Commission had never even issued one valid order limiting production for the state as a whole, much less for individual wells and leases. Under these circumstances, it must be held that the Connally Act had no application to New Mexico, that New Mexico was just like the many states that have never seen fit to establish systems for the proration of oil and gas production.

The regulation of the Federal Petroleum Board which petitioners are charged with having failed to obey was not in effect in New Mexico during the period prior to February 1950.

The Petroleum Board derives all of its authority to promulgate regulations from the Connally Act. Since there was no contraband oil in New Mexico during the period in question, the Petroleum Board was not authorized by the Connally Act to promulgate *any* regulations for New Mexico, and *all* regulations which it attempted to extend to New Mexico were void in so far as New Mexico is concerned. This is so because of the fundamental rule that the executive branch of our government cannot legislate and, therefore cannot extend the powers granted to it by Congress.

The general rule applicable to this situation is well stated in 42 AM. JUR., p. 429, as follows:

> "Administrative regulations which go beyond what the legislature has authorized have been said to be void and may be disregarded."

One of the authorities cited by the text writer in support of the above statement is the case of UTAH POWER & L. Co. v. U. S., 243 U.S. 389, 410, where this Court made the following statement with reference to regulations promulgated by the Secretary of the Interior:

> *"If any of the regulations go beyond what Congress can authorize, or beyond what it has authorized, those regulations are void and may be disregarded;* but not so of such as are thought merely to be illiberal, inequitable or not conducive to the best results."

This Court has held many times that a regulation which creates a rule out of harmony with the statute under which it was prescribed is a mere nullity, and that a regulation which attempts to extend a statute may be disregarded. MANHATTAN G. E. CO. v. COMMISSIONER OF INTERNAL REVENUE, 297 U.S. 129, 134; CAMPBELL v. GALENO CHEMICAL CO., 281 U.S. 599, 610; UNITED STATES v. GEORGE, 228 U.S. 14, 21; UNITED STATES v. UNITED VERDE COPPER CO., 196 U.S. 207, 215.

One of the leading State Court decisions on this subject is closely analogous to the present case. In HURST v. WARNER, 102 Mich. 238, 60 N.W. 440, 47 Am. St. Rep. 525, 26 L.R.A. 484, 492, the Supreme Court of Michigan held invalid a rule of the State Board of Health to disinfect baggage of all immigrants from other countries because the statute only authorized inspection in case of immigrants from a port or locality where a dangerous communicable disease existed. The holding was summed up by the Court in the following language:

> "Under these rules the baggage of all immigrants was subject to disinfection, whether such immigrant came from a port or locality where any dangerous, com-

municable disease existed or not. Indeed, there was no allegation in the complaint that the baggage in question came from such locality. This is beyond the power of the board. We do not intimate that it would not be competent for the legislature to provide for the disinfection of all baggage, where, in the opinion of the board of health, from the prevalence of a contagious disease, such precaution is necessary. But, instead of doing so, it is provided by section 3 that the board is authorized to establish general rules, and, by an inspector acting by virtue thereof, to detain railroad cars, or other public or private conveyances, etc., whenever it shall be shown to the satisfaction of such board, or to the inspector, as provided in such rules, that such cars or other conveyances contain any passenger, person, or property which has been exposed, etc., or when it is shown to the satisfaction of such board or inspector as aforesaid that such passenger, person, or property is being transported from any locality where any such dangerous, communicable disease exists, and where such persons or property are likely to carry infection of such dangerous, communicable disease. The rule in question did not make it a prerequisite to the inspection that the baggage being transported come from a locality where such disease existed, as ascertained either by the board or inspector, and in this respect was broader than the statute, and cannot be sustained."

See also LYNCH v. TILDEN PRODUCE COMPANY, 265 U.S. 315, 320; BACKUS-BROOKS CO. v. MO. PAC. RY. (8 Cir.), 21 F. 2d 4, 19; WALLING v. BALTIMORE STEAM PACKET CO. (4 Cir.), 144 F. 2d 130, 135; C. I. R. v. BETTS (7 Cir.), 123 F. 2d 534, 540; SLOUGH v. C. I. R. (6 Cir.), 147 F. 2d 836, 839; UNITED STATES v. POWELL (4 Cir.), 95 F. 2d 752, 754.

To demonstrate further that the regulations of the Department of Interior cannot exceed the authority expressly

conferred by the statute, we refer to the case of PANAMA REFINING CO. v. RYAN, 293 U.S. 388, 430. That case was decided before the Connally Act was enacted, and it held that the executive branch of the government had no authority to promulgate regulations with respect to the transportation of oil in excess of state permission without express delegation of such authority from Congress. In other words, this Court struck down regulations designed to prevent the movement of contraband oil in interstate transportation because Congress had not defined contraband oil or ordered its movement stopped. The regulations under attack in that case are set out in detail at 293 U.S. 407-9, and it will be noted that they are almost identical with the regulations now found in 30 CFR 302. The opinion contains the following language:

> "Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that § 9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.
>
> "If § 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its law-making function the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the

particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government."

The Connally Act and the regulations prescribed thereunder were not in force in New Mexico during the period covered by any count in the indictment because the State had not limited the production from any field, lease or well.

Counts XXI, XXII, XXIII and XVI charge that petitioners failed to keep daily records as required by the Federal Petroleum Board's regulation during February, March and April 1950. (R. 33-34, 35) For each of those months the State Commission issued a valid Statewide order after notice and hearing. Such orders contained only the figure representing the quantity of oil which could be produced daily during the month in the State as a whole; they did not purport to establish an allowable for any field, lease or well. During the periods covered by *all* counts in the indictment the function of limiting production from the various leases and wells was delegated to Mr. Staley. (R. 91-98)

It is clear from the record that the Commission made no attempt to limit production from any well, lease or field in the State. Each month the Commission notified Mr. Staley that it had set the Statewide allowable at a certain figure. Thereafter the Commission took no further action. (R. 64-65) Without any assistance from the Commission, Mr. Staley allocated the Statewide allowable between fields and among leases and wells. *This method obtained during all times covered by the indictment.* Since July, 1950, the Commission has taken over the duties previously performed by Mr. Staley and his staff. (R. 72)

Mr. Staley was an engineer employed by the oil producers in Southeastern New Mexico. In 1935 the Commission ap-

pointed him a "deputy" at a salary of $1.00 per year; the total amount actually paid to Mr. Staley by the Commission during 15 years was $1.00. (R. 89) Mr. Staley's salary and those of his staff were paid by the producers, who also paid all other expenses incurred in preparing and issuing the proration schedules. (R. 98) The schedules were mailed out to the producers before they were sent to the Commission; they were not approved or adopted by the Commission. (R. 98)

The preparation of these schedules was the most important proration function in New Mexico; the schedule was in fact the proration plan for the state. It told each producer how much oil he could produce from each well each day during the month. The schedule prepared by Mr. Staley was the sole limitation upon production from any well or field in New Mexico.

The trial court made the following findings with respect to the manner in which proration was handled in New Mexico during the period covered by the indictment:

> "I cannot believe that he was a deputy authorized to execute the gravest and most responsible power of the Commission, that of making the proper proration order. That is exactly what Mr. Staley did. He took the information which he compiled in his capacity as an engineer of the Lea County Operators Association and in cooperation with the association paying the expenses and doing all of the work and with a staff furnished by the association, he actually made the allocation; not only to the different wells, but to the different fields and pools in the state. I don't think there can be any dispute as to that. That was the act of Mr. Staley, not the act of the Commission. Now, I am convinced from the Champlin case that was read if Mr. Staley had been employed and authorized to gather this data and perhaps make the application, as he did,

and it was referred to the Commission; and even if they had accepted without question data he had assembled and the allocations made by him as the act of the Commission itself, all the acts would have been valid. There are various reasons why I think the allocations are not valid and chief among them, perhaps chief, it is the opinion of the Court that the Commission never made an order allocating to the different fields and pools their rightful share of the state allowable which the Commission did make and never made an order allocating to the individual wells their prorata part of the whole amount or that the pool was entitled to. Now, even if the government is correct that there can be no collateral attack upon an order of this kind, it is the very basis of the prosecution. It must always be remembered this is a criminal action and we can take nothing by averment or implication. The government would have to show an order, and as yet no order appears in this case about the Commission making any allocation to the fields, pools, or other individual wells. I must sustain the motion to suppress." (R. 102-103)

The New Mexico statutes did not authorize the Commission to appoint a deputy. It is well settled that a deputy appointed without express statutory authority cannot perform any duty involving the exercise of judgment or discretion. In U. S. v. WATASHE (10 Cir.), 102 Fed. 2d 428, 431, the court said:

> "Without statutory authority, subordinate officers have no power with respect to the duties of an office involving the exercise of judgment and discretion."

Additional authorities supporting this fundamental rule are: STATE TAX COMMISSION OF UTAH v. KATSIS, 90 Utah 406, 62 Pac. 2d 120, 122; CITY OF TAMPA v. KAUNITZ,

39 Fla. 683, 23 So. 416, 63 Amer. St. Rep. 202; MOORE v. WILSON, 84 Kan. 745, 115 Pac. 548, 549; MONROE'S GUARDIAN v. MONROE, 215 Ky. 440, 285 S.W. 250, 251; STATE v. COPENHAVER, 64 Wyo. 1, 184 Pac. 2d 594, 608; 42 AMER. JUR., p. 387; 67 C. J. S., p. 451.

It is beyond dispute that the duty to allocate production to fields, leases and wells involves the exercise of judgment and discretion. Performance of this duty is a quasi judicial function. MAGNOLIA PETROLEUM CO. v. RAILROAD COMMISSION, 128 Tex. 189, 194, 96 S.W. 2d 273, 275. In BALTIMORE AND O.R. Co. v. U. S., 264 U.S. 258, 265, this Court used this language:

> "Congress, by using the phrase 'whenever the Commission is of opinion, after hearing', prescribed quasi judicial action."

The New Mexico statutes, as has been pointed out, require notice and hearing. The language of the statute imposing the proration duty upon the Commission leaves no room for doubt that the function of allocating to fields, leases and wells is quasi judicial. Chapter 12, NEW MEXICO LAWS 1935, contains the following language:

> "Whenever, to prevent waste, the total allowable production for any field or pool in the state is fixed by the commission in an amount less than that which the field or pool could produce if no restriction were imposed, the commission shall prorate or distribute the allowable production among the producers in the field or pool. Such proration or distribution shall be made on a reasonable basis. The rules, regulations or orders of the commission shall, so far as it is practicable to do so, afford to the owner of each property in a pool the opportunity to produce his just and equitable share of the oil and gas in the pool, being an amount, so far

as can be practically determined, and so far as such can be practicably obtained without waste, substantially in the proportion that the quantity of the recoverable oil and gas under such property bears to the total recoverable oil and gas in the pool, and for this purpose to use his just and equitable share of the reservoir energy.

* * *

"Crude petroleum oil produced within the allowable as fixed by the commission shall herein be referred to as 'legal oil,' and crude petroleum oil produced in excess of such allowable shall be 'illegal oil'."

Pursuant to this statute, the Commission adopted its Order No. 235 (R. 223-224), prescribing the manner in which the *Commission* would prepare schedules. As pointed out, the Commission did not comply with its order, but attempted to delegate this authority to Mr. Staley. However, Order 235 illustrates the point that the preparation of the schedules required the exercise of judgment and discretion. Order 235 provides that:

> "The Commission will thereupon issue a proration schedule which will specify the amount of oil each unit in the state may produce each day during the following calendar month, *including shortages which may be made up and lawful overages.*"

Thus, in addition to determining the portion of the state allowable to be allocated to each well, lease and field, the one who prepared the schedule also had to determine whether prior overproduction was *lawful* and whether prior shortage could *lawfully* be made up in subsequent months.

Order 235 also provided that:

> "4. In no event should shortages when authorized

> be produced in such manner or in such daily amounts as to constitute waste." (R. 224)

Here the maker of the schedule is required not only to determine whether a shortage can be made up in future production, but also is required to determine how much additional daily production could be obtained from a given well without committing waste. The schedules prepared by Mr. Staley (R. 287) show that Mr. Staley determined (1) the fraction of the state allowable to be allocated to each well, (2) whether prior overproduction was *lawful*, and the reduction in future production required to balance prior overproduction, (3) whether shortage in prior production could *lawfully* be made up in the future, and (4) the daily rate at which such shortage could be made up in future production. Each and all of these steps required the exercise of discretion. As the trial judge said, Mr. Staley—not the Commission—performed "the gravest and most responsible power of the Commission, that of making the proper proration order." (R. 102)

The trial court's distinction between CHAMPLIN REFINING COMPANY v. CORPORATION COMMISSION, 286 U.S. 210, and the present case is sound, as demonstrated by the following quotation from the Champlin opinion:

> *"It does not appear that the agents*—Umpires and committees employed by the Commission with the consent of the government to enforce the provisions of the Act, *did more than to make investigations necessary to secure for the Commission data required to make the proration directed by Section 4*, or that they acted otherwise than as faithful subordinates."

In CHAMPLIN's case the agents furnished the data on which the commission made the proration. In the present

case Mr. Staley not only assembled the data but also made the proration. The commission did not even adopt or approve the schedules.

That the Commission's attempt to delegate its powers was unauthorized and invalid becomes even clearer when the penalty provisions of the New Mexico statutes are considered. Chapter 72, Section 22, NEW MEXICO LAWS 1935, provided that:

> "*Any person who violates* any provision of this act or *any rule, regulation or order of the commission* made hereunder, shall, in the event a penalty for such violation is not otherwise provided for herein, be subject to a penalty of not to exceed $1,000 a day for each and very day of such violation and for each and every act of violation * * * ."

The only limitation upon the production from any well, lease or field in New Mexico was the schedule prepared by Mr. Staley, acting independently of the Commission. Production of oil in New Mexico from any well, lease or field, regardless of the quantity produced, could not constitute an offense *unless* such production exceeded the allowable contained in the schedule. When we consider that criminal liability depends upon the schedules, it is apparent that the power to make the schedules could not lawfully be delegated. See EX PARTE LESLIE, 87 Tex. Crim. Rep. 476, 223 S.W. 227, 229.

Since there was no valid limitation imposed by the state upon the amount of oil that could be produced from any well or lease in the state, there could have been no contraband oil in New Mexico during any period covered by the indictment. The Connally Act and the regulations prescribed thereunder were not applicable to New Mexico be-

cause no contraband oil was or could have been produced in New Mexico. The Connally Act (15 U.S.C.A. 715 b.) expressly provides that " * * * contraband oil shall not be deemed to have been produced in a state if none of the petroleum constituting such contraband oil, or from which it was produced or derived, was produced, transported or withdrawn from storage in excess of the amounts permitted to be produced, transported or withdrawn from storage under the laws of such State or under any regulation or order prescribed thereunder by any board, commission, officer, or other duly authorized agency of such State."

The holding of the Court of Appeals that the Connally Act and the regulation applied to New Mexico during the times in question is contrary to the plain language of the Act. It is contrary also to the decisions construing the Connally Act. GRISWOLD v. U. S. (5 Cir.), 82 F. 2d 922; UNITED STATES v. SKEEN (5 Cir.), 118 F. 2d 58, 59. To demonstrate the fallacy of this holding, we quote the following language from the opinion by Judges Murrah and Pickett: "The establishment of a proration system in New Mexico invoked federal jurisdiction to prohibit interstate transportation of oil produced, transported or withdrawn in violation of State orders, rules or regulations. And in the exercise of that jurisdiction the Federal Board was undoubtedly empowered to promulgate all needful regulations, including the keeping of accurate records of wells subject to proration under State law." (R. 342-343)

Consider this language in the light of the undisputed record. Since there were no "State orders, rules or regulations," there was nothing which the Federal Board could "prohibit" and no field for exercise of its "jurisdiction." There being no contraband oil in New Mexico, the jurisdiction of the Federal Board never was invoked. There being

no "wells subject to proration under State law" there could be no basis for application of the Federal regulation requiring an accurate daily record of production from each well.

Since petitioners are charged only with failure to keep records, and not with making or keeping false records, their criminal responsibility necessarily depends upon the applicability and validity of the regulation requiring the keeping of such records.

As an alternative ground for affirming the judgments of the lower court, the opinion by Judge Huxman states, in effect, that petitioners are estopped to dispute the applicability or validity of the Federal regulation because Humble submitted to the regulation by keeping daily records, some of which were incomplete or inaccurate. To demonstrate that this novel theory is unsound, it is necessary only to refer to the nature of the charge against petitioners. Each count upon which petitioners were convicted charges the following offense: " * * * knowingly and unlawfully fail and omit to make and keep a complete and accurate daily record of the oil produced on and delivered from * * * lease." (R. 31-35)

If the regulation in question was inapplicable or invalid, petitioners were not under any duty to keep such records. Criminal responsibility necessarily depends upon the applicability and validity of the regulation. Petitioners certainly could not be convicted if they kept no records when they were under no duty to keep any. Nor could they be convicted if they kept records, some of which were incomplete or inaccurate, if no duty existed. The decisions cited in the opinion are easily distinguished on this basis.

U. S. v. MEYER, 140 Fed. 652, was a prosecution for the giving of false testimony under oath, brought under Sec-

tion 1001 of Title 18, USCA. Meyer was not prosecuted (as are Petitioners in the case at bar) for failure to comply with a regulation, so the validity of a regulation was not material in determining Meyer's guilt.

U. S. v. KAPP, 302 U. S. 214, was a prosecution for making false statements to the Secretary of Agriculture in order to defraud the government. It was brought under Section 1001 and under the conspiracy statute. Kapp was not convicted for failure to comply with the regulation. His guilt did not depend (as does Petitioners') upon the validity of the regulation.

KAY v. U. S., 303 U. S. 1, was a prosecution for making a false representation in an application for a loan from H. O. L. C. The action was brought under a statute which read in part as follows: "Whoever makes any statement, knowing it to be false * * * for the purpose of influencing in any way the action of the Home Owners' Loan Corporation * * * shall be punished * * * " Kay was not convicted of violating the provisions of the act claimed to be unconstitutional. He was convicted of violating a provision of the Act which was not attacked and which made it a criminal offense to make false statements for the purpose of influencing H. O. L. C.

Such decisions might be applicable to one of the charges of which petitioners were acquitted. Petitioners were indicted for conspiracy to violate Section 1001 by making false reports to the Petroleum Board. (R. 302) Under that charge the validity of the regulation might have been immaterial, but petitioners were acquitted of that charge. Under the charges here involved, the conviction cannot be sustained unless the regulation was valid and applicable. Petitioners cannot be punished for failing to keep certain records unless the law required them to keep such records,

and it cannot be pretended that there was any such duty without a valid regulation.

The evidence is insufficient to support the verdict and judgment because no order of the Commission was introduced in evidence.

The prosecution did not offer in evidence any order of the Commission or any of the schedules prepared by Mr. Staley. These orders and schedules were introduced by petitioners only on the motions to suppress, which were heard several weeks before the trial. The record made at the trial contains *no* Commisssion order and *no* schedule. The prosecution did not prove that the Commission had placed any limitation on the amount of oil which could be produced from any well, lease or field or from the state as a whole. (R. 2) Although the statewide orders were not suppressed, they were not offered in evidence at the trial.

In order to prove a violation of the Connally Act, the prosecution must show that the Commission had limited production. The prosecution offered no evidence to prove this vital fact. Since federal regulation begins only "where the state leaves off" (U. S. v. SKEEN, supra), no violation of federal laws or regulations is shown without proof that the state has taken the necessary steps to invoke federal authority. PANAMA REFINING CO. v. RYAN, 293 U.S. 388.

It was alleged in each of the nine counts upon which Petitioners were convicted that there was in force in New Mexico during the times covered a regulation prescribed pursuant to the Connally Act which required the keeping of certain records. In order to support this allegation with proof, the government would have to prove that the production of oil had been limited in New Mexico in order to make the Connally Act and the regulations prescribed thereunder applicable; this it entirely failed to do.

Conclusion

Petitioners pray that this Court grant the writ of certiorari herein prayed for, and that this Court reverse the judgment of the Court of Appeals and that of the District Court.

Respectfully submitted,

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APPENDIX

Chapter 168, Section 17, NEW MEXICO LAWS 1949, provides that:

"Except as provided for herein, before any rule, regulation or order, including revocation, change, renewal or extension thereof, shall be made under the provisions of this act (Secs. 69-202—69-217, 69-219—69-232), a public hearing shall be held at such time, place and manner as may be prescribed by the commission. The commission shall first give reasonable notice of such hearing (in no case less than ten (10) days, except in an emergency) and at any such hearing any person having an interest in the subject matter of the hearing shall be entitled to be heard. In case an emergency is found to exist by the commission which in its judgment requires the making of a rule, regulation or order without first having a hearing, such emergency rule, regulation or order shall have the same validity as if a hearing with respect to the same had been held after due notice. The emergency rule, regulation or order permitted by this section shall remain in force no longer than fifteen (15) days from its effective date, and, in any event, it shall expire when the rule, regulation or order made after due notice and hearing with respect to the subject matter of such emergency rule, regulation or order becomes effective."

Chapter 168, Section 5, NEW MEXICO LAWS 1949:

"The Commission shall prescribe its rules of order or procedure in hearing or other proceedings before it under this act (Secs. 69-202—69-217, 69-219—69-232). Any notice required to be given under this act or under any rule, regulation or order prescribed by the commission shall be by personal service on the person affected, or by publication once in a newspaper of general circulation published at Santa Fe, New Mexico,

and once in a newspaper of general circulation published in the county or each of the counties if there be more than one, in which any land, oil or gas or other property which may be affected shall be situated. Such notice shall issue in the name of 'the state of New Mexico' and shall be signed by at least a majority of the members of the commission or by the secretary of the commission, and the seal of the commission shall be impressed thereon, and it shall specify the number and style of the case, and the time and place of hearing, shall briefly state the general nature of the order or orders, rule or rules, or regulation or regulations contemplated by the commission on its own motion or sought in a proceeding brought before the commission, the name of the petitioner, or applicant, and, unless the order, rule or regulation is intended to apply to and affect the entire state, it shall specify or generally describe the common source or sources of supply that may be affected by such order, rule or regulation. Personal service thereof may be made by any agent of the commission or by any person over the age of eighteen years, in the same manner as is provided by law for the service of summons in civil actions in the district courts of this state. Such service shall be complete at the time of such personal service or on the date of such publication, as the case may be. Proof of service shall be by the affidavit of the person making personal service, or of the publisher of the newspaper in which publication is had, as the case may be. All rules, regulations and orders made by the commission shall be entered in full by the secretary thereof in a book to be kept for such purpose by the commission, which shall be a public record and open to inspection at all times during reasonable office hours. A copy of any such rule, regulation or order, certified by the secretary of the commission under the seal of the commission, shall be received in evidence in all courts of the state with the same effect as the original."